

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

S.A.M.

DATE: October 23, 2015

TO: Kathleen M. McKinney, Regional Director
Region 15

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Nissan North America, Inc.
Nissan Canton Assembly Plant
Case 15-CA-145053

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The Region submitted this case for advice as to the appropriate remedy where the Employer's uniform policy interfered with its employees' right to wear union insignia. We conclude that the Employer failed to demonstrate special circumstances justifying its interference with the right to wear union insignia, that accordingly complaint should issue, absent settlement, alleging that the Employer's uniform policy violated Section 8(a)(1), and that the Region should seek an order requiring the Employer to rescind its unlawful uniform policy.

FACTS

Nissan Motor Company Limited has its headquarters in Yokohama, Japan, and is one of the largest automobile manufacturers in the world. Its related company, Nissan North America, Inc. ("Nissan"), is responsible for the manufacture and distribution of Nissan and Infinity vehicles in North America. One of Nissan's factories is located in Canton, Mississippi, where it employs 6,300 workers.

The Charging Party, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("Union"), began an organizing campaign in about 2011 or 2012. In 2013, the Union began distributing t-shirts to employees to wear at work, and made a "big push" for t-shirts to be worn in the plant starting in early 2014. Employees wore the t-shirts frequently, sometimes on a daily basis. The t-shirts had messages such as, "Organize, Build Power, Win Justice," "Pro-Union, Pro-Nissan," "United we Stand, Divided we Beg," and "Labor Rights are Civil Rights," with some t-shirts showing images of people at civil rights rallies. The t-shirts had a positive impact on employee relations and helped defuse racial tension, especially a t-

shirt that showed Walter Reuther and Martin Luther King, Jr. shaking hands with a message that advocated for civil rights. None of the t-shirts were inflammatory, pitted employees against one another, or had negative messages about Nissan.

At this time, Nissan did not have a mandatory uniform policy. Employees were permitted to wear jeans or pants without metal buttons or studs that may damage the cars, and any shirt they wanted, including t-shirts, button down shirts, and polo shirts, as long as it did not contain vulgar or offensive language. Employees also had the option of wearing a uniform consisting of grey pants and a Nissan t-shirt, button down shirt, or polo shirt in navy blue, red, green, or black. The optional uniforms were provided by Nissan. Employees could not wear buttons or pins because they might damage the cars. The dress code stated:

Nissan expects all employees to use good judgment in matters of dress, grooming and personal hygiene. You should not wear clothes that are offensive to your coworkers or others. Nissan supplies company wearing apparel free of charge, but wearing this apparel is voluntary in most areas. In certain areas, specific clothing or footwear is required due to safety issues and quality concerns. Nissan prohibits the wearing of canvas or open-toe shoes in production areas.

Starting in June 2014, Nissan informed employees that it was instituting a uniform requirement that would go into effect on January 1, 2015. The uniform consists of a red polo shirt, gray pants or shorts, a black belt, and a gray jacket. The polo shirt has the Nissan wordmark on the front and the American flag on the sleeve. Employees were told they cannot alter the new uniforms. Employees can wear personal long-sleeved shirts underneath the Nissan polo shirt, but the sleeves cannot have writing, patches, or badges on them. Nissan says employees will be permitted to wear Union insignia on baseball caps.

Despite the initial plan of rolling out the uniform policy in January 2015, the policy has not yet fully been implemented. Moreover, Nissan has not yet enforced the policy or disciplined employees for wearing union t-shirts, even if the employees have been issued Nissan uniforms.

ACTION

We agree with the Region that the Employer's uniform policy, which clearly has impinged on the exercise of Section 7 rights, violates Section 8(a)(1) because the Employer has failed to demonstrate special circumstances that justify the uniform

policy's restrictions on wearing union insignia and that the appropriate remedy is to require the Employer to rescind the unlawful uniform policy.¹

Section 7 of the Act protects the right of employees to wear attire and insignia that address union and other employment-related issues while at work.² An employer may restrict such activity only by presenting substantial evidence of special circumstances sufficiently important to outweigh Section 7's guarantees.³ The Board has found special circumstances when the display of union insignia would likely jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image the employer has established as part of its business plan.⁴

The Board has made clear that neither a uniform policy nor a dress code in itself establishes special circumstances.⁵ Further, the Board has indicated that where an

¹ Nissan argues as a preliminary matter that this case is not ripe for adjudication because the new uniform policy has not been fully implemented (not all employees have received the new uniforms) or enforced. As to the absence of full implementation, the fact that not all employees have been subjected to the policy is irrelevant; some employees have been issued uniforms and told they must wear them, which has restricted those employees in the exercise of their Section 7 rights. As to the absence of any enforcement of the policy against those who have failed to follow it, it is well established that mere maintenance of an overly broad policy that would reasonably tend to chill employees in the exercise of their Section 7 rights violates Section 8(a)(1). See, e.g., *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1998).

² *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945) (upholding right of employees to wear union buttons while on the job); see also *P.S.K. Supermarkets*, 349 NLRB 34, 34 (2007).

³ *Eckerd's Market, Inc.*, 183 NLRB 337, 338 (1970) (finding the "vague, general evidence" of customer complaints presented by the employer did not constitute substantial evidence of "special circumstances" warranting removal of the union buttons worn by its employees).

⁴ *P.S.K. Supermarkets*, 349 NLRB at 35 (citing *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), *enforced* 99 F. App'x 233 (D.C. Cir. 2004); and *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982)).

⁵ *World Color (USA) Corp.*, 360 NLRB No. 37, slip op. at 1 n.3 (2014), *reviewed and remanded*, 776 F.3d 17 (D.C. Cir. 2014); see also *P.S.K. Supermarkets*, 349 NLRB at 35 ("Nor is the requirement that employees wear a uniform a special circumstance

employer requires a uniform that interferes with employees' Section 7 right to wear union insignia, the employer will have the burden of demonstrating special circumstances for that requirement. Thus, in *Stabilus, Inc.*, in dicta, the Board stated that:

An employer cannot avoid the 'special circumstances' test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia. The Board has consistently applied that test where employers have required employees to wear particular articles of clothing and have correspondingly prohibited them from wearing clothing displaying union insignia.⁶

The *Stabilus* Board subsequently referred to the employer's "burden of proving that special circumstances justified its uniform policy," holding that even if that burden had been met, the employer violated Section 8(a)(1) by disparately enforcing its policy to prohibit union t-shirts.⁷

Recently, in *World Color (USA) Corp.*, the Board affirmed the ALJ's finding that the employer unlawfully prohibited employees from wearing any baseball caps other than company caps, because the company cap was not a required part of the employees' uniform.⁸ But the Board specifically stated that it would have ordered the rescission of the policy banning union caps even if baseball caps were, in fact, part of the employer's uniform policy, reiterating that "[a]n employer cannot avoid the 'special circumstances' test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union

justifying a button prohibition."); *Woonsocket Health Center*, 245 NLRB 652, 659 (1979) (affirming ALJ finding that "[t]he mere fact that an employer has a dress code, as here, is not a special circumstance" which warrants depriving employees of their right to wear union insignia at work).

⁶ 355 NLRB 836, 838 (2010) (citing *Great Plains Coca-Cola Bottling Co.*, 311 NLRB 509, 515 (1993) (no special circumstances justified employer banning the wearing of union jackets before an election even though the employer's policy only permitted employees to wear company jackets); and *Meijer, Inc.*, 318 NLRB 50, 56-57 (1995) (employer cannot ban employee from wearing union jacket instead of uniform jacket in a noncustomer area), *enforced*, 130 F.3d 1209, 1217 (6th Cir. 1997)).

⁷ *Id.*

⁸ 360 NLRB No. 37, slip op. at 1 n.3.

insignia.”⁹ Thus, an employer’s uniform policy that precludes the wearing of union insignia overcomes the presumption that employees may wear union insignia in the workplace only where the employer demonstrates special circumstances for the policy.

Nissan’s uniform policy interferes with employees’ ongoing exercise of their Section 7 right to wear union insignia in the workplace. Although the policy does not explicitly restrict Section 7 activity, the policy necessarily has that effect, since employees cannot wear the union t-shirts they had been wearing if they must wear the uniform shirt.¹⁰ Moreover, Nissan forbids employees from wearing buttons or pins on their uniforms because they may cause a hazard to Nissan’s work product, which prevents employees from wearing union buttons. Thus, the only way employees can wear Section 7 messages is through the wearing of insignia shirts instead of the uniform shirt.¹¹ By requiring employees to wear a uniform, Nissan thus defeats their right to wear union insignia. Nissan should not be permitted to interfere with employees’ statutory rights in this manner unless it demonstrates special circumstances that justify requiring employees to wear a uniform that precludes the wearing of union insignia.

Nissan contends that the following special circumstances justify its uniform policy. First, it claims that the policy is necessary to prevent damage to automobiles. Second, it argues that it wishes to project a distinct public image when the public tours the facility and to promote teamwork and pride on the part of employees. Finally, Nissan claims that it wishes to increase efficiency by streamlining supervisors’ daily duties to eliminate the need for them to inspect employees’ clothing for mutilation risks. None of these arguments has merit.

⁹ *Id.* (quoting *Stabilus, Inc.*, 355 NLRB at 838).

¹⁰ Accordingly, this is not the kind of ambiguous rule that requires analysis under the first prong of the *Lutheran Heritage* test. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004).

¹¹ Nissan permits long-sleeved shirts to be worn under the uniform shirt, but requires that they be free of logos or any other writing, which prevents employees from having union insignia on their long-sleeved shirts. Nissan permits hats that contain union insignia, but given the size of the plant and the distances between employees, and the fact that some employees cannot work comfortably in a hat, this is a far less effective means of communicating the Union’s message.

A. Damage to Product

An employer can demonstrate it has a special circumstance for banning union insignia where the insignia would cause damage to its product. For example, in *Hanes Hosiery*, the employer lawfully required employees to either remove union buttons or cover them where the employer demonstrated the buttons could cause “picks” in its hosiery because the buttons had a pin that protruded a quarter inch beyond the circular button.¹² The ALJ’s decision, adopted by the Board, noted that the restriction on wearing the union buttons was reasonable in light of the fact that the buttons were not absolutely banned because employees could cover them with a transparent material to prevent damage to the company product.¹³ But in *Honda of America Manufacturing, Inc.*, the Board adopted the ALJ’s finding that the employer’s policy requiring employees to wear a white uniform, intended in part to avoid damage to the employer’s product in an auto manufacturing plant, violated Section 8(a)(1) because its terms in effect deprived employees of their right to wear union buttons and insignia and the employer failed to demonstrate the policy was necessary to prevent damage to vehicles: not all employees came into contact with the product and could cause scratches or damage, employees were permitted to wear watches and rings that could cause the same type of damage as union insignia, maintenance employees wore company-issued utility belts with metal buckles and tool pouches that had exposed metal rivets while working near the vehicles, and the employer had not conducted any scientific studies regarding the effect of the rule on production.¹⁴ Thus, the employer’s maintenance of the rule violated Section 8(a)(1).¹⁵

Here, the Union is not contesting the Employer’s ban on buttons and pins. Instead, the issue is whether Nissan has a legitimate concern about damage to vehicles that may occur if employees are wearing t-shirts that it does not provide. But Nissan has not provided any evidence of employees’ personal t-shirts damaging

¹² 219 NLRB 338, 346-47 (1975).

¹³ *Id.* at 347.

¹⁴ 260 NLRB 725, 728-29 (1982).

¹⁵ *Id.* at 729 (the employer also failed to demonstrate other asserted special circumstances); *see also Boch Honda*, 362 NLRB No. 83, slip op. at 3 (Apr. 30, 2015) (employer failed to demonstrate special circumstances justifying rule prohibiting employees from wearing union buttons where the rule was written to apply to employees who came into contact with the public regardless of whether they had contact with vehicles and the employer did not provide evidence that vehicles had been damaged by employee pins or the pins posed a safety hazard).

cars, nor has Nissan demonstrated that the uniform policy would reduce the likelihood that damage would occur. Thus, Nissan has failed to demonstrate that its uniform policy is required to prevent damage to its product.

B. Public Image

Employees' exposure to customers standing alone is not a special circumstance.¹⁶ However, an employer may establish special circumstances where union insignia "unreasonably interfere[s] with a public image which the employer has established, as a part of its business plan" through strict dress code requirements for its employees.¹⁷ For example, in *W San Diego*, the employer – a high-end hotel chain – demonstrated its business plan was to create a "wonderland" experience where guests could fulfill their "fantasies and desires," and that the employer's uniforms for its servers were part of this plan.¹⁸ On the other hand, in *P.S.K. Supermarkets*, the Board held that the employer's requirement that its employees wear company-issued uniforms, along with those employees' "significant" customer contact, did not constitute special circumstances justifying the employer's ban on all buttons.¹⁹

¹⁶ *World Color (USA) Corp.*, 360 NLRB No. 37, slip op. at 8 ("Customer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia by employees"; but finding that employer did not show employees had contact with customers); *see also United Parcel Service*, 312 NLRB 596, 597 (1993) (no special circumstances justifying prohibition on lapel pins with union logo on company-provided uniform; pins did not interfere with employer's desired public image of its employees being "neatly attired" where the pin was small, inconspicuous, and free of provocative messages or language), *enforcement denied*, 41 F.3d 1068 (6th Cir. 1994).

¹⁷ *Meijer, Inc.*, 318 NLRB at 50 (quoting *United Parcel Service*, 312 NLRB at 597) (employer's ban on union pins unlawful where employer offered no evidence that pins interfered with company's public image and did not enforce its policy in a consistent and nondiscriminatory manner); *United Parcel Service*, 195 NLRB 441, 441 n.2, 449-50 (1972) (finding special circumstances where UPS developed a public image that was "an integral part of its business and a substantial business asset" that would be adversely affected by drivers wearing a button 2.5 inches in diameter that said "Vote Jack Ryan Local 294").

¹⁸ 348 NLRB 372, 372-373 (2006).

¹⁹ 349 NLRB at 35; *see also Howard Johnson Motor Lodge*, 261 NLRB 866, 868 n.6 (1982) (employer not justified in prohibiting union buttons in order to avoid potentially adverse reaction by customers because employees' rights do not depend on

Here, there is no evidence that the public image presented by Nissan's production employees to potential customers touring its factories is vital to its business plan, and these employees have far less public contact than in other cases where the Board found no special circumstances. Moreover, the Employer has not even articulated how the employees' Union t-shirts would interfere with its public image.²⁰ Since employee exposure to the public alone is not a special circumstance,²¹ Nissan has not shown that its public image concern is a special circumstance that justifies its ban on union t-shirts.

C. Teamwork and Pride

Although the Employer asserts that the uniform policy is meant to foster "teamwork" and "pride in the product" produced, the Board has never recognized that rationale as a special circumstance privileging the restriction of union insignia. The most analogous employer concern recognized by the Board is where an employer is seeking to reduce animosity or tension between opposing employee groups and to maintain decorum and discipline in the workplace. In *United Aircraft Corp., Pratt & Whitney Division*, the Board found an employer lawfully asked employees to remove union buttons identifying themselves as "loyal strikers" who did not cross the picket line during a nine-week strike, where the strike had been accompanied by mass picketing and violence and there was great animosity between the striking employees and those who crossed the picket line.²² Based on evidence of "poststrike instances of discord and bitterness between the two employee groups," the Board found that the employer's legitimate concern that the pins would create disorder in the plant

"the pleasure or displeasure of an employer's customers"), *enforced*, 702 F.2d 1 (1st Cir. 1983); *Nordstrom, Inc.*, 264 NLRB 698, 701–702 (1982) (employer's desire to avoid creating controversy among customers insufficient justification for ban on union insignia); *Eckerd's Market, Inc.*, 183 NLRB at 337–38 (general evidence of customer displeasure with union buttons insufficient to establish special circumstances); *Floridan Hotel of Tampa, Inc.*, 137 NLRB 1484, 1486 (1962) (fact that employees "come in contact with . . . customers does not constitute such 'special circumstances' as to deprive them of their right, under the Act, to wear union buttons at work"), *enforced*, 318 F.2d 545 (5th Cir. 1963).

²⁰ *Cf. W San Diego*, 348 NLRB at 372-73 (union button would have interfered with the all-black shirt, slacks, and apron used to create a special atmosphere for customers).

²¹ *See, e.g., P.S.K. Supermarkets*, 349 NLRB at 35.

²² 134 NLRB 1632, 1633-35 (1961).

justified the ban.²³ In *Eckerd's Market, Inc.*, on the other hand, the Board found that an employer had not demonstrated any animosity among employees that would justify banning union buttons that said "Retail Clerks Union, AFL-CIO. July 1969."²⁴

Nissan cannot demonstrate that its uniform policy is necessary to establish decorum and discipline in the workplace. In fact, the Union t-shirts have contributed to a positive workplace. In the past, the plant struggled with racial tension. Once the Union started distributing t-shirts with a photo of Walter Reuther and Martin Luther King, Jr. shaking hands, racial tension died down and employees worked more harmoniously together. There is also no evidence that the Union t-shirts have caused employees to react negatively toward Nissan management or supervisors. Nor is there any evidence that the Union distributed t-shirts that are inflammatory toward non-Union supporters or toward management. Thus, Nissan cannot demonstrate that its uniform policy is necessary to reduce tension or maintain decorum in the plant, and its assertion that the uniform requirement meets the special circumstances test because uniforms will more generally foster "teamwork" and "pride in the product" has no support in current Board jurisprudence.

²³ 134 NLRB 1635; *accord*, *Reynolds Electrical Co.*, 292 NLRB 947, 947 n.1 (1989) (employer lawfully banned buttons with a red diagonal line drawn through the word "scab" to maintain employee discipline based on evidence that there were numerous hostile acts by strikers against nonstrikers during and after the strike); *see also* *Komatsu America Corp.*, 342 NLRB 649, 650 (2004) (finding employer demonstrated special circumstances where it banned employees from wearing t-shirts that compared the Japanese employer's outsourcing to the Pearl Harbor attacks because the comparison was "inflammatory and offensive" and the employer was legitimately concerned about disruption of the harmonious relationships between employees and management); *Southwestern Bell Telephone Co.*, 200 NLRB 667, 671 (1972) (employer lawfully banned t-shirts that said "Ma Bell is a Cheap Mother" to maintain discipline and harmonious employee-employer relations).

²⁴ 183 NLRB at 338; *see also* *Floridan Hotel of Tampa, Inc.*, 137 NLRB at 1486 (finding no special circumstances justified banning union buttons the size of a dime that contained the union's name or initials where there was no strike, no animosity among employees, and no evidence that banning the buttons was necessary to maintain employee discipline); *Boise Cascade Corp.*, 300 NLRB 80, 82 (1990) ("[G]eneral, speculative, isolated or conclusory evidence of potential disruption does not amount to 'special circumstances.'").

D. Employee Efficiency

Nissan also argues that its uniform policy is necessary to promote efficiency in the plant by streamlining its supervisors' daily tasks so as to eliminate the need to examine every employee's attire for mutilation risk. However, in the line of cases cited by Nissan that reference "efficient production" as a special circumstance, the asserted efficiency concern typically related to an employer's interest in maintaining discipline, decorum, or workplace safety, and in none of these cases did the Board find special circumstances had been demonstrated.²⁵ Moreover, even if the type of "employee efficiency" concern expressed by Nissan could constitute special circumstances, Nissan has not demonstrated that requiring employees to wear a uniform is more efficient than enforcing its prior dress code policy. Supervisors will still need to check employees daily to ensure that they are wearing the uniform and wearing it properly (e.g., with nothing attached to the uniform). Nor has Nissan shown that supervisors spent an inordinate amount of time inspecting employees' clothing for mutilation hazards prior to implementing its uniform policy.

In sum, based on the foregoing analysis, we conclude that Nissan has not met its burden to establish the requisite special circumstances to justify the restrictions it has placed on its employees' statutory right to wear union attire at work. Thus, the

²⁵ See *United Parcel Service*, 325 NLRB 1, 4 (1997) (referring to "efficient production" but concluding employer violated Section 8(a)(1) by removing a flyer from a union bulletin board because it was critical of UPS and not because its removal was necessary to maintain decorum and discipline); *Autumn Court*, Case No. 8-CA-34334, JD-120-04, Dec. 30, 2004, at 27 (finding employer unlawfully banned union buttons without proving the buttons had a negative effect on efficient or safe production of its facility). Cf. *Pay 'N Save Corp.*, 247 NLRB 1346, 1349 (1980) (defining an "employee efficiency" claim as a claim that union insignia would interfere with work or production as recognized in *Hanes Hosiery*, 219 NLRB 338 (union pins could cause damage to employer's product)); *Standard Fittings Co.*, 133 NLRB 928, 942-45 (1961) (finding employees were not engaged in horseplay or "milling around" as a result of wearing union badges and were in fact talking to one another about their right to wear union badges after the employer demanded their removal; minor interruptions in production largely resulted from the employer's interference with the employees' right to wear union badges and not from employees wearing badges, and union badges were not a safety hazard that could interfere with work performance); *Midstate Telephone Corp.*, 262 NLRB 1291, 1292 (1982) (concluding employer failed to prove banning union t-shirts would promote "efficient production in the workplace" where the t-shirts were not obscene or profane, did not cause discord or bitterness among employees, did not adversely affect decorum and discipline, and were not likely to impair safety or production).

Region should issue complaint, absent settlement, alleging that Nissan's uniform policy violates Section 8(a)(1) and seek rescission of the Employer's unlawful uniform policy as a remedy.²⁶

/s/
B.J.K.

ADV.15-CA-145053.Response.Nissan North America (b) (6), (b) (7)(C)

²⁶ See *World Color (USA)*, 360 NLRB No. 37, slip op. at 3 (ordering employer to rescind its overbroad policy prohibiting employees from wearing baseball caps with union insignia).